(12)

No. 99-1178

Supreme Court, U.S.
FILED
JUL 26 2000
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

SOLID WASTE AGENCY OF
NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY
CORPS OF ENGINEERS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE THE NATIONWIDE PUBLIC PROJECTS COALITION, THE AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, and THE METROPOLITAN DENVER WATER AUTHORITY IN SUPPORT OF PETITIONER

LAWRENCE R. LIEBESMAN
(Counsel of Record)
RAFE PETERSEN
LINOWES & BLOCHER
1010 Wayne Avenue
Silver Spring, MD. 20910
(301) 588-8580
Counsel for Amici Curiae.

Washington, D.C. • THIEL PRESS • (202) 320-3288

3288

Page

TABLE OF CONTENTS

Interests of the Amici Curiae. 1

Summary of Argument 6

Argument 7

I. THE MIGRATORY BIRD RULE VIOLATES FUNDAMENTAL PRINCIPLES OF FEDERALISM. ABSENT A "CLEAR STATEMENT" FROM CONGRESS, A REVIEWING COURT SHOULD NOT SANCTION USURPATION OF STATE AND LOCAL CONTROL OF LAND AND WATER RESOURCES. 7

A. The Clear Statement Principle Limits the Reach of Section 404 Regulatory Jurisdiction 8

B. The Migratory Bird Rule Improperly Expands the Definition of Navigable Waters and Invades the Land Use Regulatory Authority of State and Local Agencies In Violation of the "Clear Statement" Principle. 10

C. The Seventh Circuit's Interpretation Could Have a Significant Adverse Effect on Vital Public Projects 13

II. THE CORPS'S ARGUMENT THAT FEDERAL REGULATION IS NECESSARY TO PROTECT THE NATURAL HABITAT OF MIGRATORY BIRDS IGNORES STATE PROGRAMS THAT EXCEED THE CLEAN WATER ACT IN SCOPE 19

Conclusion 25

TABLE OF AUTHORITIES

Page

Cases:

Borden Ranch Partnership v. U.S. Army Corps of Engineers, No. S97-0858, 1999 WL 1797329 (E.D. Cal. Nov. 8, 1999). 3

Cargill Inc. v. United States, 516 U.S. 955 (1995). 11

City of Dallas, Texas v. FCC, 165 F.3d 341 (5th Cir. 1999) 12

Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742 (1980). 19

Gregory v. Ashcroft, 501 U.S. 452 (1991) 9, 10, 12

Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995). 11

Resource Investments, Inc. v. U.S. Army Corps of Engineers, 151 F.3d 1162 (9th Cir. 1998) 14

United States v. Bass, 404 U.S. 336 (1971). 10

United States v. Lopez, 514 U.S. 549 (1995). 9, 24

United States v. Morrison, 529 U.S. ___ (2000). 12

United States v. Wilson, 133 F.2d 251 (4th Cir. 1997) 11

Statutes:

Federal Water Pollution Control Act, 33 U.S.C. §§1251-1387 (1994). 2

CWA section 101, 33 U.S.C. §1251(b). 8, 19

CWA section 404, 33 U.S.C. §1344 . . . . . 8, 11, 24

Statutes, continued: Page

CWA section 502, 33 U.S.C. §1362 . . . . . 8, 11

CWA section 510, 33 U.S.C. §1370 . . . . . 8, 19

Cal. Water Code §§13000-14958. 22

Cal. Water Code §13050. 22

Conn. Gen. Stat. §§22a-36 to -45 (1994). 20

Fla. Stat. Ann. §§373.414-421 (West 1995) 20

Fla. Stat. Ann. §373-019 23

415 Ill. Comp. Stat. 5/3.56 (West 2000) 21, 22

Mass. Gen. Laws Ann. Ch. 131, §§40, 40A (West 1994). 20

MD. Code Ann., Envir. §5-102. 22

MD. Code Ann., Envir. §5-902. 22

Me. Rev. Stat. Ann. Tit. 38, §§480-A to -U (West 1994) 20

Mich. Comp. Laws §281.701-722 (1994). 20

Min. Stat. §103G.222-2242 (1994) 20

N.H. Rev. Stat. Ann. §482-A:1-:27 (1994). 20

N.J. Rev. Stat. §13:9B-1 to -30 (1994). 20

N.Y. Envtl. Conserv. Law §§24-0101-1301 (Consol. 1994). 20

Pa. Stat. Ann. Tit. 25, §105.17 (1993). 20

R.I. Gen. Laws §§2-1-18 to -24 (1994) 20

Va. Code Ann. §§62.1-44.3-44.5 (2000). 20

Vt. Stat. Ann. Tit. 10, §1272 (1994) 20

Regulations: Page

Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,818 (March 9, 2000) 15

65 Fed. Reg. 12,881 16

65 Fed. Reg. 12,892-893. 17

65 Fed. Reg. 12,897 16

33 C.F.R. §322.4 17

33 C.F.R. §330.2 16

40 C.F.R. §230. 17

40 C.F.R. §233.70 24

40 C.F.R. §233.71 24

Other Authorities:

Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. 1 (1999) 21

California Environmental Protection Agency, *State of the State's Wetlands* (1998) 23

Congressional Budget Office, *Trends in Public Infrastructure Spending* (May, 1999) 14, 15

Alexandra D. Dawson, *Massachusetts' Experience in Regulating Wetlands, in Wetland Protection: Strengthening the Role of the States* 225 (Association of State Wetland Managers ed., 1985) 21

Therese Dunphy, *Corps' New Nationwide Permit Restrictions Leave Producers Very Little Room to Maneuver*, Aggregate Manger, June 2000 17

Environmental Law Institute, *Almanac of Enforceable State Laws to Control Nonpoint Source Water Pollution* (1998). 25

Federal Wetland Protection Policy, 1993: Hearings on S. 1304 Before the Subcomm. On Clean Water, Fisheries and Wildlife of the Senate Comm. On Environment and Public Works, 103d Cong., 1st Sess. (1993) (statement of the National Association of State Departments of Agriculture) 17

Institute for Water Resources, *U.S. Army Corps of Engineers, Cost Analysis for the 1999 Proposal to Issue and Modify Nationwide Permits* (2000) 18

Jon A. Kusler, et al., *State Wetland Regulation: Status of Programs and Emerging Trends* (Association of State Wetland Managers ed., 1994) 21

National Association of Counties, *Analysis of The Army Corps of Engineers' NWP 26 Replacement Permit Proposal* (January 2000) 18

S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971); 118 Cong. Rec. 10.699 (1972) 8

U.S. Environmental Protection Agency, Office of Wetlands, Oceans, and Watersheds, *State or Tribal Assumption of the Section 404 Permit Program* (May 25, 1999) 23

Other Authorities, continued: Page

Other Authorities, continued: Page

William L. Want, *Law of Wetland Regulation* (1992) 20

The Nationwide Public Projects Coalition, the American Road and Transportation Builders Association, and the Metro Denver Water Authority, as *amici curiae*, respectfully submit this brief in support of Petitioner Solid Waste Agency of Northern Cook County, pursuant to Rule 37.3 of the Supreme Court Rules.[1]

INTERESTS OF THE AMICI CURIAE

The *Amici* are public sector agencies and associations, local governments, and private entities that provide essential services to the public.

Nationwide Public Projects Coalition (NPPC) is a not-for-profit association whose members include state, regional and local government agencies and associations and private sector entities. Its members represent over 12 million constituents, extending from Connecticut to California and from Alaska to Georgia. NPPC fundamentally represents the interests of the public in ensuring that vital public infrastructure services such as municipal, industrial and agricultural water supply, flood control, irrigation, wastewater treatment, stormwater management, street and highway construction and maintenance, aggregate mining, and environmental quality amenities are provided in a safe, timely and environmentally-beneficial fashion. Consisting predominantly of public officials and firms that serve public sector needs, NPPC's members must ensure that a responsible balance is

---

[1] The parties have consented to the filing of this brief. The *Amici* have filed letters of consent with the Clerk. Pursuant to this Court's Rule 37.6, no counsel for any party in this case authored this brief in whole or in part, and no person or entity other than the *Amici* and their counsel has made a monetary contribution to the preparation and submission of this brief.

achieved between environmental, health, and safety goals and the protection of lives and property.

American Road and Transportation Builders Association ("ARTBA") is made up of 5,000 member organizations in the transportation construction industry, including construction contractors; professional engineering firms; federal, state and local transportation administrators; heavy equipment manufacturers; and materials suppliers. These member companies employ more than 1,000,000 people in the transportation construction industry in the United States.

The Metro Denver Water Authority (MDWA), a political subdivision and public corporation of the state of Colorado, is made up of 15 Suburban Denver cities, counties and special districts that provide water and/or wastewater services to about 1,300,000 persons.

This case could have a profound impact on the *Amici,* and on the public that they serve. The U.S. Army Corps of Engineer's ("Corps") assertion of Clean Water Act ("CWA")[2] regulatory jurisdiction over isolated bodies of water such as manmade ponds, drainage ditches, vernal pools, swales, rainwater filled depressions and excavation ditches, intermittent streams and drainages, dry washes and other remote, ephemerally wet areas alleged to be actual or potential habitat for migratory birds affects public and private projects throughout the Nation. As discussed below, the resources at issue in this case are not waters or wetlands in the traditional sense, but rather are often low points in the landscape where rainwater collects.[3] Taken to its logical conclusion, this

[2] Federal Water Pollution Control Act, 33 U.S.C. §§1251-1387 (1994).

[3] "A vernal pool is a low point in the landscape underlain with a dense soil layer and wherein rainwater collects. Generally, [footnote continued]

overreach of federal jurisdiction via the migratory bird rule could have a chilling effect on public projects by allowing the Corps and the Environmental Protection Agency ("EPA")[4] to override carefully considered decisions and investments of state and local governments that are intended to meet vital public needs, including life-saving infrastructure. The potential impact of the migratory bird rule affects a broad array of public projects.

1. *NPPC's* members regularly are subject to the CWA section 404 permit program. For example, stormwater management agencies generally require access to wetlands and streams and other areas that are seasonally wet due to collection of rainwater. These agencies require authorization from the Corps to conduct basic, but important, maintenance functions such as cleaning debris basins and clearing vegetation and other obstructions that choke flood control channels. Such activities are critical to maintaining the maximum capacity and proper function-

it is inundated part of the year and is dry during the summer, and may or may not be connected with other hydrological features." *Borden Ranch Partnership v. U.S. Army Corps of Engineers,* No. S97-0858, 1999 WL 1797329, at *1 (E.D. Cal. Nov. 8, 1999) (describing wetlands at issue in enforcement action). "Intermittent drainages are basically streams or water courses with a defined bed and bank that generally transport water during and after rains." *id.*

[4] A 1979 Opinion of the Attorney General determined that EPA has the ultimate authority for determining the extent of CWA jurisdiction. *See* 43 Op. Attorney General No. 15 (September 5, 1979). The Corps and EPA, however, entered into a memorandum of agreement in 1989 that accords the Corps primary authority to determine the scope of geographical jurisdiction under the CWA. *See* Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act (Jan. 19, 1989).

ing of the flood control systems in the case of a major flood event. These activities are especially critical for NPPC members in Southern California that must rapidly clean out accumulated sediment from flood control channels to prevent flood damage and loss of life. Many of these areas have water during storms but are otherwise dry.

2. *Metro Denver Water Authority ("MDWA")* is supported by annual membership assessments based on the number of water and/or sewer taps provided. The population growth rate in MDWA's region is among the highest in the United States and, accordingly, new infrastructure needs are substantial. MDWA has legitimate concerns that assertion of jurisdiction over isolated and ephemeral waters will make it very difficult to construct and maintain new water and sewer facilities in a timely manner and could severely impact the Authority's ability to provide vital public services, particularly when emergencies arise.

3. *ARTBA's* members provide vital transportation infrastructure such as highways, bridges, airports, railroads, mass transit facilities, and similar structures. Construction and maintenance of transportation infrastructure often requires access to wetlands, streams, lakes, and rivers. Accordingly, ARTBA members regularly require authorization from the Corps to provide and maintain the Nation's valuable transportation infrastructure. ARTBA's members include public agencies responsible for the construction of transportation systems, aggregate miners that produce materials used in transportation projects, and members that construct stormwater management facilities for transportation projects. The assertion of federal jurisdiction over man-made waters such as roadside drainage ditches and seasonally wet depressions has substantially impacted necessary public transportation infrastructure projects.

It is *Amici's* belief that, if the Seventh Circuit's interpretation is upheld, the intrusion of the federal agencies into the state and local public projects process will significantly impede the ability of public entities to provide essential services. The *Amici's* diverse membership must be able to rely on minimal levels of certainty and predictability in the processes that are necessary for design and implementation of public works projects. The *Amici's* members invest countless hours and hundreds of millions of tax dollars planning, assuring financing, preparing for, and constructing public service projects of equal or greater importance and cost than the Solid Waste Agency of Northern Cook Cook County ("SWANCC") balefill. If public projects that impact only intrastate, isolated waters are subject to federal supremacy that overrides local authority to plan, site and approve such projects, countless hours and millions of tax dollars for vital public works projects would be needlessly sacrificed.

Moreover, the requirement that public agencies obtain section 404 permits for repetitious and routine maintenance activities such as clearing vegetation from flood control channels, debris basins and other catchment areas disrupts normal maintenance schedules and delays needed maintenance work. Such a requirement also increases the cost of that work, and in some cases exposes lives and property to unnecessary risk. The long-range consequences for the Nation may include significant decreases in not only the quantity and quality of public works projects, but also the ability to timely deliver public services necessary to protect public health and welfare.

SUMMARY OF ARGUMENT

1. The migratory bird rule's intrusion into matters traditionally reserved to state and local governments cannot be permitted, absent a clear statement of Congressional intent. By limiting the Corps's jurisdiction to "navigable waters," and by expressly recognizing, preserving, and protecting the "primary responsibilities" of states with respect to "land and water resources," Congress expressed its clear intent *not to* authorize jurisdiction over isolated, intrastate waters lacking any meaningful connection to interstate commerce. The Seventh Circuit's ruling contravenes these principles.

2. The Seventh Circuit's interpretation could have a significant adverse effect on vital public projects. The Corps's expansion of jurisdiction to include all potential migratory bird habitat could have the practical effect of allowing the Corps to overturn state and local approvals of public projects impacting isolated "wet areas" based on an alleged federal interest in the "aggregate" health of the Nation's migratory bird population.

3. Assertion of jurisdiction over isolated intrastate waters violates fundemental principles of federalism by intruding into areas traditionally reserved for state and local regulation. State regulatory schemes provide adequate protection for isolated, intrastate waters. There are many state programs that regulate wetlands and control non-point source pollution. These programs provide adequate protection for the functions of isolated, intrastate waters.

ARGUMENT

I.

THE MIGRATORY BIRD RULE VIOLATES FUNDAMENTAL PRINCIPLES OF FEDERALISM. ABSENT A "CLEAR STATEMENT" FROM CONGRESS, A REVIEWING COURT SHOULD NOT SANCTION USURPATION OF STATE AND LOCAL CONTROL OF LAND AND WATER RESOURCES.

Both the trial and appellate courts improperly deferred to the Corps's assertion of jurisdiction over isolated waters that were not "navigable" in any true sense. In fact, the waters involved in this case were essentially rain filled trenches excavated by strip mining in upland areas. The Seventh Circuit, while acknowledging that the Corps made no finding that the use of the site by migratory birds had any actual effect on interstate commerce, held that "a single activity that itself has no discernable effect on interstate commerce may still be regulared if the aggregate effect of that class of activity has a substantial effect interstate commerce." Pet. App. 6a. This holding is of particular importance to *Amici's* public works projects. The expansion of the definition of "navigable waters" to encompass isolated water bodies with no direct connection to interstate commerce expands the authority of the federal agencies to influence, and indeed, as was the case with SWANCC, negate carefully planned public works projects. This overreach intrudes into matters traditionally reserved to state and local governments – an intrusion that the Court has held cannot be permitted, absent a clear statement of Congressional intent.

A. The Clear Statement Principle Limits the Reach of Section 404 Regulatory Jurisdiction.

Section 101 of the CWA specifically limits the authority of federal agencies to intrude into state and local matters, stating:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. . . .

33 U.S.C. §1251(b). Congress also explicitly stated that nothing in the CWA is to "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." 33 U.S.C. §1370. In furtherance of these policies, Congress declined to extend the authority of the Corps to require permits for the discharge of "pollutants" into many known types of water bodies – limiting jurisdiction to only "navigable" waters. *See* 33 U.S.C. §§1311(a), 1344(a), 1362(12).[5] Similarly, Congress excluded groundwater from the CWA's regulatory program after finding that including such waters would have involved the federal government in complex state jurisdictional rules. *See* S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971); 118 Cong. Rec. 10,699 (1972). State regulatory programs in these reserved areas were to complement the mandatory regulatory programs that would be administered by federal agencies under sections 402 and 404 of the CWA. Accordingly, Congress also enacted section

[5]In turn, "navigable waters" are defined in section 502 of the CWA as "The waters of the United States." 33 U.S.C. §1362-(7).

208 to encourage the states to develop area-wide management plans that would address the pollution sources not regulated by federal law. *See* 33 U.S.C. §1288. Thus, Congress struck a careful balance – providing federal authority where necessary to protect federal interest in the health of "navigable waters," while preserving state authority in all other spheres.

The migratory bird rule eviscerates this careful balance, extending federal authority to include isolated, intrastate, seasonally wet areas that would otherwise remain in the exclusive control of state and local decisionmakers. Under our federal system, however, the Court does not allow this abrogation of local power unless it is clear that Congress considered and intended, when it passed the authorizing legislation, to alter the traditional balance between federal and state powers. This "clear statement" principle applies "in cases implicating Congress's historical reluctance to trench on state legislative prerogatives or to enter into spheres already occupied by the States." *United States v. Lopez*, 514 U.S. 549, 611 (1995) (Souter, J., dissenting) (citation omitted).

As the Court explained in *Gregory v. Ashcroft*, 501 U.S. 452 (1991),

> our Constitution establishes a system of dual sovereignty between the States and the Federal Government . . . [in which] "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government."

Id. at 457 (quoting *Texas v. White*, 68 U.S. (7 Wall.) 700, 725 (1869)).

Of course, as long as Congress is acting pursuant to one of its enumerated powers, such as its power under the Commerce Clause, the Supremacy Clause allows Congress to trump state law, even in areas (such as land use) that by tradition fall within the state sphere. Nonetheless, under the "clear statement" principle, the Court will not simply assume that Congress has used its power to override state authority. Rather, "[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). Mere ambiguity will not suffice to demonstrate that Congress intended to utilize the Commerce Clause to intrude into state interests. *See Gregory*, 501 U.S. at 464.

B. The Migratory Bird Rule Improperly Expands the Definition of Navigable Waters and Invades the Land Use Regulatory Authority of State and Local Agencies In Violation of the "Clear Statement" Principle.

The Corps utilizes the migratory bird rule to improperly expand the scope of federal regulatory authority to extend to isolated waters, such as manmade ponds and depressions excavated in uplands, seasonally wet drainage ditches and dry washes, and other remote, marginally wet areas. The Seventh Circuit's decision allows the Corps to assert jurisdiction over any wet area having no other connection to interstate commerce other than the *potential* presence of migratory birds and the "aggregate" impact of the "destruction of the natural habitat of migratory birds. . . ." Pet. App. 7a. The migratory bird rule goes well beyond the intended scope of the CWA, and invites unwarranted agency abuse where the public projects of

municipal and quasi-municipal agencies involve purely isolated, intrastate waters.

The Seventh Circuit reasoned that people spend money on hunting and bird-watching equipment and travel across state lines to view such birds. *Id.* This rationale, however, ignores the fact that Congress limited the scope of the CWA to "navigable waters" and, in turn, to "waters of the United States." 33 U.S.C. § §1344(a), 1362(7).[6] In effect, the migratory bird rule drops the key words "navigable" and "United States" and rewrites statutory authority to cover all "waters" based on any remote nexus to interstate or foreign commerce. Yet, as noted by the Fourth Circuit in *United States v. Wilson*, 133 F.2d 251, 257 (4th Cir. 1997), "the phrase 'waters of the United States' when used to define the phrase 'navigable waters' . . . refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters."[7]

The CWA does not provide the Corps with a "clear statement" that it possesses authority to assert jurisdiction over such isolated waters based on their potential use as migratory bird habitat. The Corps appears to believe, and the Seventh Circuit agreed, that it may bend the Commerce Clause in such a manner as to expand the

---

[6] Without repeating the arguments of Petitioner, the *Amici* note that they concur with Petitioners' assertion that the Seventh Circuit improperly interpreted the Commerce Clause.

[7] Similarly, the validity of such broad interpretation of the Commerce Clause set forth in *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995) is questioned by Justice Thomas in a dissent from the denial of certiorari to review that decision, where Justice Thomas notes that the Ninth Circuit stretched the Commerce Clause "beyond the breaking point." *See Cargill Inc. v. United States*, 516 U.S. 955, 959 (1995) (Thomas, J., dissenting from denial of certiorari).

definition of "waters of the United States" to cover isolated, intrastate waters and thus bootstrap itself into regulation of local affairs. However, "*Lopez* emphasized . . . that even under our modern expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds." *United States v. Morrison*, 529 U.S. ___ (2000). The notion that Congress has provided a "clear statement" that the Corps's jurisdiction extends to isolated waters is belied by the limitation that the federal entities regulate solely "navigable" waters, and by sections 101's and 510's clear recognition of the primacy of state authority over intrastate land and water resource protection. A broad interpretation of statutory authority is not enough where Congress has not stated its intent to preempt state authority." *See City of Dallas, Texas v. FCC*, 165 F.3d 341, 348 (5th Cir. 1999). Congressional intent to alter the traditional constitutional balance between the states and the federal government must be "unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).

In sum, the almost "limitness" expansion of federal authority inherent in the migratory bird rule allows the Corps to essentially arrogate federal power over state and local governments contrary to the express language of the CWA and fundamental principles of federalism. "[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." *Gregory*, 501 U.S. at 464 (quoting L. Tribe, *American Constitutional Law* §6-25, 480 (2nd ed. 1988)).

C. The Seventh Circuit's Interpretation Could Have a Significant Adverse Effect on Vital Public Projects.

The ramifications of the Seventh Circuit's interpretation of the scope of the CWA are significant. The Seventh Circuit's decision could severely impact the process of decisionmaking for many vital projects sponsored by the *Amici*. The *Amici* bring together an alliance of regional water, highway and public works agencies, local and state governments, and private sector associations and companies that plan for and construct vital public works projects. The *Amici* are motivated by the increasing difficulty for state and local governments to deliver needed services affordably, efficiently, and on a timely basis, as a result of the nature and scope of various federal environmental laws. The role of public works agencies in providing services such as vital flood control, potable water, and maintenance of utility rights-of-way is severely hampered by the migratory bird rule and its triggering of the complex section 404 wetlands permit program. The Corps's expansion of jurisdiction to include all potential migratory bird habitat could have the practical effect of allowing the Corps to overturn state and local approvals of public works projects impacting isolated "wet areas" based on an alleged federal interest in the "aggregate" health of the Nation's migratory bird population.

The balefill project at issue in this case, where the denial of a section 404 permit halted a vital $20 million landfill, is but one example of the type of project that could be completely thwarted by the Corps's assertion of jurisdiction over local projects impacting purely intra-

state, isolated waters,[8] Indeed, national data in infrastructure funding reflects the greatly increased burdens on local governments. A 1999 report prepared by the Congressional Budget Office ("CBO") indicates that the percentage of federal dollars contributed to the construction, operation and maintenance of public infrastructure has been steadily decreasing. *See* CBO, *Trends in Public Infrastructure Spending* (May, 1999) <http://www.cbo.gov/byclasscat.cfm?class=0&cat=21>.[9] Stating that "public facilities, resources, and services known as infrastructure are vital to the nation's production and distribution of private economic output as well as to its citizens' overall quality of life," the report notes that in 1994 total public spending for infrastructure was $171 billion, but that the federal share of spending has decreased. *See id.* at 1. The analysis contained in the CBO report of spending on infrastructure relative to gross domestic product reveals increasing levels of responsibility placed on state and local governments to finance infrastructure. Since the late 1980s, "state and local governments have contributed approximate 75 percent of public infrastructure outlays, and current patterns of

[8] For example, in *Resource Investments, Inc. v. U.S. Army Corps of Engineers*, 151 F.3d 1162 (9th Cir. 1998), the Corps denied a section 404 permit for a 320 acre municipal landfill after over six years of extensive state and local reviews. A unanimous panel of the Ninth Circuit overturned the lower court, which had upheld the denial, and found that the Corps lacks authority to require a section 404 permit for a facility approved by the state under the Resources Conservation and Recovery Act, 42 U.S.C. §§6901-6992.

[9] The CBO report examines federal, state and local spending from 1956 through 1994 and estimates federal outlays through 2003 for eight types of infrastructure: highways, mass transit, rail, aviation, water transportation, water resources, water supply and wastewater treatment facilities.

spending maintain that trend." *Id.* at 2. While federal spending for highways is expected to increase, projected federal spending is expected to decrease by an average annual rate of 2.7 percent for all other categories of infrastructure throughout the 1998-2003 period. *See id.*

In light of the multitude of public services that state and local governments are now responsible for providing to their residents, state and local governments often must contract with or rely upon private entities to provide many of these services. Unfortunately, the Seventh Circuit's decision creates a disincentive for private entities to enter into such partnerships with public agencies. With the possibility that the federal government will assert jurisdiction over isolated wet spots due to the "aggregate" impact on interstate commerce of potential migratory bird use, private entities will be more hesitant to undertake contracts to provide essential public services. Even where private entities are willing to provide these services, they will have to increase the cost of the contracts in order to account for the risks and unpredictability flowing from possible assertion of jurisdiction by the Corps. Thus, the Seventh Circuit's decision unduly constrains the options of public entities in the current fiscal climate where public agencies are under increasing pressure to provide greater services with fewer resources.

To compound this problem, this decision has occurred at a time when federal jurisdiction under the CWA is becoming increasingly more onerous. In March 2000, the Corps made substantial changes to the "fast track" Nationwide Permit ("NWP") program under section 404 of the CWA; phasing out NWP 26 for impacts to isolated or headwaters areas and substituting five activity-specific nationwide permits. *See* Corps, Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg.

12,818 (March 9, 2000). Under the prior program, the *Amici* relied on NWP 26, which permitted discharges of up to 3 acres in certain "isolated" waters or "headwater" wetlands.[10] Thus, even where the Corps's jurisdiction over certain isolated waters was questionable, the more expedited nationwide permit program was available in many cases.[11] However, under the revised program, there is a maximum one-half (1/2) acre limit for impacts to "Waters of the United States" which includes "ephemeral streams."[12] Even where the new one half acre limit could be met, the use of the new NWP program is severely restricted for activities conducted within the 100-year floodplain. For example, the mining replacement permit (NWP 44) may not be used within the floodway of the 100-year floodplain, or within 100 feet of the ordinary high water mark of headwater streams where average annual flow is greater than 1 cubic foot per second.[13] A recent preliminary study by the National Aggregates Association indicates that 77 percent of respondents had one or more operations within the 100 year floodplain and 57 percent anticipated that they would be seeking a dredge and fill permit for activities within the 100 year floodplain within the next five years.[14] Thus, the floodplain restriction could severely impact aggregate production so necessary for the Nation's infrastructure.

[10]The Corps defines "headwaters" as "non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are part of a surface tributary system to an interstate or navigable water of the United States upstream of the point on the river or stream at which the average annual flow is less than five cubic feet per second." 33 C.F.R. §330.2(d). "Isolated waters" are defined as "those non-tidal waters of the United States that are: (1) Not part of a surface tributary system to interstate or navigable waters of the United States; and (2) Not adjacent to such tributary waterbodies." 33 C.F.R. §330.2(e).

[11]Corps data shows that more than 80% of the Corps permitting under section 404 fell under the NWP program. *See* U.S. Army Corps of Engineers Regulatory Branch, *Section 404 of the Clean Water Act and Wetlands, A Special Statistical Report*, July 1995.

[12]The Corps. defines an "ephemeral stream" as having "flowing water only during and for a short duration, after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow." 65 Fed. Reg. at 12,897. An "ephemeral strema that meets the criteria at 43 C.F.R. part 328 is a water of the United States." *Id.* at 12,881.

The Seventh Circuit's decision will have a greater impact on public entities than otherwise would have been the case, due to the contemporaneous nature of the decision with the March 2000 changes to the NWP program. As a result, *Amici's* members will be subject to the far more onerous and time-consuming individual permit process under the CWA because many activities vital to the Nation's infrastructure, such as aggregate mining, flood control and stormwater management activities, impact floodplains with isolated ephemeral waters and have become ineligible for the NWP program.[15]

[13]*See* 40 Fed. Reg. at 12,892-893.

[14]*See* Therese Dunphy, *Corps' New Nationwide Permit Restrictions Leave Producers Very Little Room to Maneuver*, Aggregate Manager, June 2000, at 37.

[15]The individual permit process involves a detailed evaluation of whether a proposed discharge is in the "public interest." The Corps considers and balances many factors and must determine that there are no practicable alternatives to the proposed discharge, *see* 33 C.F.R. §322.4, and must also comply with EPA's detailed 404(b)(1) guidelines, *see* 40 C.F.R. §230. This involves individual public notices allowing for agency and public comment that must be considered before a permit may be issued. The Corps must prepare detailed findings to support its permit decision.

The Corps is well aware of the cost impacts of the changes to the NWP program. As required by the FY 2000 Energy and Water Development Appropriations Act, the Corps prepared a report for Congress estimating workload and costs impacts related to the increase in the number of individual permits that would be required as a result of the more stringent NWP requirements. The Corps estimated that the changes will result in an annual additional 4,429 individual permits, with $48 million in direct costs to the regulated public. *See* Letter from Joseph W. Westphal, Assistant Secretary of the Army (Civil Works) to the Honorable Pete V. Domenici, Chairman, Subcommittee on Energy and Water Development Committee on Appropriations United States Senate (May 22, 2000) <HTTP://www.usace.army.mil/inet/functions/cw/>. In a separate report, the National Association of Counties concluded that the changes will cost the general public an additional $300 million annually, or $100,000 per acre affected. *See* National Association of Counties, *Analysis of The Army Corps of Engineers' NWP 26 Replacement Permit Proposal* (January 2000) (hereinafter NACO Report) <http://www.naco.org/leg/-Advocacy/corps.cfm>.[16] *Amici* submit that many of these costs will involve public projects and will ultimately be borne by taxpayers.

---

[16]The recent Corps report reveals that the processing times for individual permits may increase dramatically under the new NWP program. For example, the Corps study indicates that in year five under the replacement permit program, processing times and backlogs are predicted to be more than four times the levels experienced in FY 98 with an average of 400 processing days per application. *See* Institute for Water Resources, U.S. Army Corps of Engineers, *Cost Analysis for the 1999 Proposal to Issue and Modify Nationwide Permit* 23 (2000) <http://www.usace.army.mil/inet/functions/cw/>. The report by the National Association of Counties indicates that it takes a total of 788 days to process an individual permit. *See* NACO Report, at 2.

II.
THE CORPS'S ARGUMENT THAT FEDERAL REGULATION IS NECESSARY TO PROTECT THE NATURAL HABITAT OF MIGRATORY BIRDS IGNORES STATE PROGRAMS THAT EXCEED THE CLEAN WATER ACT IN SCOPE.

The *Amici* recognize the legitimate objective of the section 404 program to protect the Nation's waters. However, these goals are not served where the areas to be regulated are isolated, seasonally wet areas that are already subject to state regulation. Fundamental principles of federalism dictate that control of isolated, intrastate waters is properly within the purview of state and local governments. The regulation of intrastate, isolated waters is the regular function of local governments in their administration of many ordinary land uses – from building new homes to renewal of past mining sites for the construction of public works projects. Indeed, the Court has recognized that "regulation of land use is perhaps the quintessential state activity." *See Federal Energy Regulatory Commisson v. Mississippi*, 456 U.S. 742, 768 n.30 (1980).

The CWA explicitly recognizes the fundamental principle of federalism, as recognized in *Gregory*, that there are not exclusive, but, rather, overlapping spheres of authority between the federal government and state and local governments. As noted above, section 101 of the CWA recognizes, preserves and protects "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources." 33 U.S.C. §1251(b), and section 510 notes that nothing in the CWA is to "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States," 33 U.S.C. §1370.

Thus, the plain language of the CWA makes clear that it was Congress's intent to bestow "primary" responsibility upon the states to protect these water resources. The Corps's assertion of jurisdiction over isolated, intrastate waters, (and with that, over land use decisions), is inconsistent with this intent.

There are literally thousands of state and local governments that regulate wetlands and waters.[17] Accepting their key role in wetland protection, state and local governments throughout the Nation have passed comprehensive wetland laws, many of which are much broader in scope than the CWA section 404 program, and, therefore, offer far greater protection.[18] In fact, several states

[17] *See Federal Wetland Protection Policy, 1993: Hearings on S. 1304 Before the Subcomm. On Clean Water, Fisheries and Wildlife of the Senate Comm. on Environment and Public Works*, 103d Cong., 1st Sess. (1993) (statement of National Association of State Departments of Agriculture), *available in* LEXIS, Legis Library, Cngtst File (noting that over 5,000 local governments have adopted wetland protection regulations).

[18] On April 19, 2000, Virginia enacted new legislation for the protection of state waters and wetlands. *See* Va. Code Ann. §§61.1-44.3-44.29 (2000). The law prohibits the discharge of "sewage, industrial wastes, other wastes, or any noxious or deleterious substances" into "state waters" ("state waters" is defined as "all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands"). *Id.* §62.1-44.3, 44.5; *see also* Conn. Gen. Stat. §§22a-36 to -45 (1994); Fla. Stat. Ann. §§ 373.414-421 (West 1995); Me. Rev. Stat. Ann. Tit. 38, §§480-A to -U (West 1994); Mass. Gen. Laws Ann. Ch. 131, §§40, 40A (West 1994); Mich. Comp. Laws §281.701-722 (1994); Min. Stat. §103G.222-2242 (1994); N.H. Rev. Stat. Ann. §482-A:1-:27 (1994); N.J. Rev. Stat. §13:9B-1 to -30 (1994); N.Y. Envtl. Conserv. Law §§24-0101-1301 (Consol. 1994); Pa. Stat. Ann. Tit. 25, §105.17 (1993); R.I. Gen. Laws §§2-1-18 to 24 (1994); Vt. Stat. Ann. Tit. 10, §1272 (1994). For a thorough survey of state wetland laws, *see generally* William L. Want, *Law of Wetland Regulation* (1992).

began regulating these areas well before the federal government took interest. "The first wetlands protection statute in the United States was passed in Massachusetts in 1963 . . . By the time Congress enacted the CWA in 1972, Massachusetts had nine years of experience regulating wetlands, and was already reforming its laws to provide greater local control and accountability while maintaining state-level oversight." Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtr. L. 1, 48 (1999).[19]

Since the enactment of the CWA, many states have enacted legislation within far greater reach than the federal program. For example, 17 states (including Illinois) have laws furnishing protection for freshwater wetlands,[20] while other states have shoreline and coastal zone protection programs.[21] Illinois, in fact, prohibits the discharge of contaminants into the "waters of the State", which is broadly defined to include "all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are

[19] *See also* Alexandra D. Dawson, *Massachusetts' Experience in Regulating Wetlands*, in *Wetland Protection: Strengthening the Role of the States* 225 (Association of State Wetland Managers ed., 1985).

[20] *See* 415 Ill. Comp. Stat. 5/11 (West 2000). The other states include: Connecticut, Florida, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Oregon, Rhode Island, Vermont, and Wyomong; *See* Jon A. Kusler et al., *State Wetland Regulation: Status of Programs and Emerging Trends*, 2 (Association of State Wetland Managers ed., 1994).

[21] These states include: Washington, Wisconsin, Delaware and California, among others. *See id.* at 3.

wholly or partially within, flow through, or border upon this State." 415 Ill. Comp. Stat. 5/3.56 (West 2000).

Maryland is an excellent example of a state that has a regulatory regime that goes beyond the 404 program, having enacted one of the first state laws declaring a goal of "no net overall loss in nontidal wetland acreage and function and to strive for a net resource gain in nontidal wetlands over present conditions." *See* MD. Code Ann., Envir. §5-902 (1996). In addition, Maryland's comprehensive wetland legislation brings the following areas within its jurisdiction:

> both surface and underground waters within the boundaries of the state . . . all ponds, lakes, rivers, streams, public ditches, tax ditches, and public drainage systems within the state, other than those designated and used to collect, convey, or dispose of sanitary sewage; and the floodplain of free-flowing waters determined by the Department on the basis of the 100-year flood frequency.

MD. Code Ann., Envir. §5-102. This broad definition of the "Waters of the State" allows for the protection of waters extending well beyond the reach of the federal program.

In turn, the state of California regulates its waters through the federal CWA, supplemented by the California Porter-Cologne Water Quality Control Act "Porter-Cologne" or "Act"). *See* Cal. Water Code §§13000-14958. California's act broadly defines "Waters of the State" as "any surface water or groundwater, including saline waters, within the boundaries of the state." Cal. Water Code §13050. Labeling itself as the "nation's first statewide comprehensive wetlands program," the California Wetlands Conservation Policy establishes a framework and strategy to: (1) ensure no overall net loss and

achieve a long-term gain in the quantity, quality, and permanence of wetlands in California; (2) reduce procedural complexity in the administration of State and federal wetlands programs; and (3) encourage partnerships to make landowner incentive programs and cooperative planning efforts the primary focus of wetlands conservation and restoration. *See* California Environmental Protection Agency, *State of the State's Wetlands* (1998).

As a final example, the Florida State Water Resource Plan defines "Water"or "waters in the state" in the following manner:

> any and all water on or beneath the surface of the ground or in the atmosphere, including natural or artificial watercourses, lakes, ponds, or diffused surface water and water percolating, standing, or flowing beneath the surface of the ground, as well as all coastal waters within the jurisdiction of the state.

Fla. Stat. Ann. §373-019. Again, with such a broad scope of jurisdiction, the waters protected by the state regulators far exceed the federal program.

Indeed, the EPA has recognized the essential role of federalism in the protection of wetlands and other waters, explaining:

> More than a dozen States already are currently administering aquatic resources/wetlands protection programs similar to the Federal Section 404 program. This makes sense because State and Tribal regulators are, in many cases, located closer to the proposed activities and are often more familiar with the local resources, issues, and needs than are Federal regulators.[22]

---

[22] U.S. Environmental Protection Agency, Office of Wetlands, Oceans, and Watersheds, *State or Tribal Assumption of the*

[footnote continued]

Moreover, the CWA establishes parallel regimes by which states can obtain authorization to administer the permitting programs under sections 402 and 404 of the Act. *See* CWA section 404, 33 U.S.C. §1344(g). To date, two states have actually assumed the 404 program. *See* 40 C.F.R. §233.70 (Michigan), and 40 C.F.R. §233.71 (New Jersey).

With literally thousands of local governments already regulating wetlands, there are ample state and local protections of isolated waters in place to facilitate more creative and, therefore, less burdensome regulatory schemes than under the federal program.[23] The domination of federal authority over isolated, intrastate waters could quash the policy innovation of the state and local governments and interfere with their expertise in local land use issues.

Moreover, state protection of isolated waters is further enhanced by state regulation covering activities that would escape regulations as "discharges" under section 404 of the CWA, especially non-point source pollution:

> Nonpoint source discharges, which consist generally of polluted runoff from farms, forests, land development and other activities, are not regulated under the [CWA]. Instead they are addressed primarily through nonregulatory means, such as planning, incentive and cost-share mechanisms. . . . Yet, increasingly, states are finding it necessary to deal with nonpoint source discharges that cannot be

Section 404 Permit Program (May 25, 1999) <http:/www.epa.gov/owow/wetlands/facts/fact23.html>.

[23] As Justice Kennedy noted, state and local jurisdictions "perform their roles as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S. at 581.

> prevented, controlled, or abated adequately by these means.

Environmental Law Institute, *Almanac of Enforceable State Laws to Control Nonpoint Source Water Pollution*, 1 (1998). All fifty states, the District of Columbia, and the Commonwealth of Puerto Rico have laws that can apply to nonpoint source discharges. *See id.*

In sum, precluding federal regulation of isolated, intrastate waters does not mean that these areas will escape regulation. To the contrary, there is ample state and local authority to protect these areas for their various functions, including migratory bird use.

CONCLUSION

The *Amici* Nationwide Public Projects Coalition *et al.* respectfully request this Court to reverse the Seventh Circuit's ruling upholding the migratory bird rule. That ruling adversely affects the public projects community and sanctions the Corps's intrusion into areas traditionally reserved for state and local governments.

Respectfully submitted,

LAWRENCE R. LIEBESMAN
(Counsel of Record)
RAFE PETERSEN
LINOWES & BLOCHER
1010 Wayne Avenue
Silver Spring, MD 20910
(301) 588-8580
Counsel for Amici Curiae.